

# Why the ICC Should Open a Preliminary Examination in Mexico: Allegations of Torture Committed in the Context of the War on Drugs

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## 1. Background and Communications Submitted to the ICC

In December 2006, the former Mexican President declared a ‘war on drugs’, and launched a policy which intended to increase security of the State and its population. Yet, in reality, it has led to an escalation of violence and human rights abuses. With evidence emerging that the violations have become widespread and systematic, civil society has turned to the International Criminal Court (‘ICC’) on the understanding that Mexico may be experiencing crimes that fall within the Court’s jurisdiction.

On at least four occasions (November 2011,<sup>1</sup> October 2012,<sup>2</sup> December 2012<sup>3</sup> and September 2014<sup>4</sup>) different actors have submitted information to the Office of the Prosecutor (‘OTP’) of the ICC alleging the commission of crimes against humanity in Mexico, in accordance with Article 15 of the ICC Statute.

In this policy brief, I intend to set out reasons why the ICC should waste no more time in opening a preliminary examination. I will do so through specific analysis of the widespread and systematic practice of torture as a crime against humanity directed against a civilian population by agents of the State in Mexico, within the context of

<sup>1</sup> The first communication was presented by more than 24,000 individuals. For more information, see “Juicio Penal Internacional a Calderón” (<http://juicioacalderon.blogspot.mx>).

<sup>2</sup> The second communication was submitted by the Mexican Commission for the Defense and Promotion of Human Rights (‘CMDPDH’), the Citizens’ Commission of Human Rights of the Northeast (‘CCDH’), and the Federation for Human Rights (‘FIDH’) ([http://www.cpimexico.org.mx/portal/wp-content/uploads/2014/12/comunicaci%C3%B3n\\_22102012\\_versi%C3%B3n\\_p%C3%BAblica.pdf](http://www.cpimexico.org.mx/portal/wp-content/uploads/2014/12/comunicaci%C3%B3n_22102012_versi%C3%B3n_p%C3%BAblica.pdf)).

<sup>3</sup> The third was presented by former governor of the State of Coahuila, Humberto Moreira: “Largo camino en La Haya a la demanda de Moreira contra Calderón”, in *Proceso*, 28 December 2012 (<http://www.proceso.com.mx/?p=329009>).

<sup>4</sup> The fourth communication was submitted by the CMDPDH, the CCDH and FIDH ([https://www.fidh.org/IMG/pdf/mexique\\_642ang2014web.pdf](https://www.fidh.org/IMG/pdf/mexique_642ang2014web.pdf)).

the policy related to the war on drugs.

## 2. The Security Policy and Joint Operations Target the Civilian Population

The above-mentioned September 2014 communication refers to potential cases of torture committed by public servants in the state of Baja California; however, it did not include information about crimes committed by criminal organisations. It also did not determine whether a non-international armed conflict was taking place in Mexico or parts of the territory. Therefore, all victims mentioned in the communication are understood to be the civilian population, whether or not they are members of the armed forces or organised armed groups.

The information contained in this communication does not assume that the potential cases referred portray the practice of torture across the country. In contrast, it focuses on evidence in one region, over a specific period, where the security policy resulted in a large number of victims whose testimonies reveal similar patterns of conduct (that can be either acts or omissions or both). This allows one to infer the existence of a plan or policy to commit crimes against civilian population.

### 2.1. The Security Policy: Combatting Drug-Trafficking

In December 2006, former President Calderón issued the so-called ‘declaration of war’ against organised crime, along with a State policy that has led to the proliferation of crimes, many of which can be deemed to fall within the jurisdiction of the ICC. For instance, more than 70,000 people have been killed in the context of the security policy;<sup>5</sup> there are over 25,000 enforced disappearances

<sup>5</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Mission to Mexico, Addendum, A/HRC/26/36/Add.1, 28 April 2014 (<http://www.legal-tools.org/doc/23605c/>).

(according to the official register),<sup>6</sup> thousands of torture cases have occurred; and more than 280,000 victims have been forcibly displaced.<sup>7</sup> Despite the change of president in December 2012, there has neither been a substantial modification on the policy nor in its results.

## 2.2. Joint Operations

The security policy implies that the armed forces have adopted a significant role in public security tasks. This is controversial as the Mexican Constitution clearly establishes public security as the exclusive duty of police officers. Nonetheless, within this context, over 49,000 military personnel are deployed in “Joint Operations” and participate in the administration of strategic security enforcement alongside the police forces of the three government levels (federal, state and municipal). In the first 100 days of President Calderón’s administration, six Joint Operations began in the states of Michoacan, Tijuana (Baja California), Guerrero, Nuevo León, Tamaulipas and on the ‘Golden Triangle’ (Sinaloa, Durango, Chihuahua).<sup>8</sup>

In addition, former President Calderón openly claimed that this was a war to the death against organised crime, and that the entire force of the State would be deployed: This was a long-term battle that would cost a lot of money and, unfortunately, many human lives.<sup>9</sup>

## 3. The Scale and Pattern of Torture Appear Widespread and Systematic

The ‘September 2014 Communication’ focuses on the practice of torture as a crime against humanity in Baja California as part of the Joint Operation. It includes 30 incidents with a total of 95 victims, where the most likely groups of perpetrators include the Ministry of National Defence (‘SEDENA’).<sup>10</sup> The communication was built upon an investigation, which demonstrated that torture was practiced as an instrument to obtain information, coerce statements or fabricate allegations.

These acts were the result of abuse of power by police and military forces in respect of vulnerable persons due to their belonging to social and economic groups of little education or the middle and lower classes of

society. Most of the victims – young males, housewives, retired persons, small business owners and drivers – were portrayed as drug cartel members by mass media on the basis of unsupported allegations against them. Having been portrayed in the media as being members of criminal organisations, the judiciary found the victims to be innocent of such claims, following long and costly procedures for the victims and their families.

Generally, many crimes go unreported in Mexico due to lack of trust in judicial institutions.<sup>11</sup> Official data indicate that unreported crimes or crimes that did not follow a pre-trial investigation across the country during 2013 reached 93.8%. In 2012 this figure was 92.1%.<sup>12</sup> Furthermore, there are no registers or national databases that enable the identification of the number of cases of torture. Hence, in order to contextualise whether this crime is committed as part of a widespread or systematic attack against a civilian population, it is essential to analyse the country’s available information.

Following freedom of information requests, the Office of the Federal Attorney-General (‘PGR’)<sup>13</sup> has confirmed that 4,055 cases of torture were reported between 2006 and 2014, of which 1,884 have been investigated<sup>14</sup> by public prosecutors and only 11 cases have been submitted to a judge (indictments).<sup>15</sup> This implies that only 46% of the reported cases of torture are investigated and only 0.3% are brought before a judge. What is even worse is that, according to official data,<sup>16</sup> only five sentences for the crime of torture have been registered in the whole country.

<sup>11</sup> Not only inefficiency and corruption fuel mistrust, but also in some of the regions of the country, victims are afraid of reprisals after reporting the crimes they were subjected to. In the last National Survey about Victimization and Perception about the Public Security, the National Institute of Statistics and Geography of Mexico (‘INEGI’) concluded that the second cause for not reporting a crime was due to “authority mistrust”, making up 21% of the victims. The first leading cause of victimization not reported refers to victims who deem this action a waste of time, making up 31% of victims. *National Survey about Victimization and Perception about the Public Security, National Institute of Statistics and Geography of Mexico 2014* (<http://www3.inegi.org.mx/sistemas/tabuladosbasicos/tabdirecto.aspx?c=33685&s=est>).

<sup>12</sup> INEGI, Press Release No. 418/14, 30 September 2014 ([http://www.inegi.org.mx/est/contenidos/proyectos/encuestas/hogares/regulares/envipe/envipe2014/doc/envipe2014\\_09.pdf](http://www.inegi.org.mx/est/contenidos/proyectos/encuestas/hogares/regulares/envipe/envipe2014/doc/envipe2014_09.pdf)).

<sup>13</sup> Procuraduría General de la República (<http://www.pgr.gob.mx/>).

<sup>14</sup> CMDPDH, ‘PGR access to information request: 0001700020615’, December 2014. The PGR responded there is no updated information.

<sup>15</sup> CMDPDH, ‘PGR access to information request: 0001700133014’.

<sup>16</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez Mission to México, 29 December 2014, A/HRC/28/68/Add.3, para. 32 (<http://www.legal-tools.org/doc/a0ff5b/>).

<sup>6</sup> SESNSP, Registro Nacional de Datos de Personas Extraviadas o Desaparecidas (‘RNPED’) (National Register of Missing People), see <http://www.secretariadoejecutivo.gob.mx/rnped/consulta-publica.php>.

<sup>7</sup> CMDPDH, ‘Desplazamiento interno forzado: una dolorosa realidad’, Press Release, 13 May 2015 (<http://cmdpdh.org/2015/05/desplazamiento-interno-forzado-una-dolorosa-realidad/>).

<sup>8</sup> Luis Astorga, “¿Qué querían que hiciera?”: *Inseguridad y delincuencia organizada en el gobierno de Felipe Calderón*, Grijalbo, Mexico, 2015, p. 23.

<sup>9</sup> Carlos Bravo Regidor, “Una ayudadita de memoria para Felipe Calderón”, in NEXOS, Blog de la Redacción, 28 January 2011 (<http://redaccion.nexos.com.mx/?p=2571>).

<sup>10</sup> Secretaría de la Defensa Nacional (<http://www.sedena.gob.mx>).

|                         | 2006-2010 | 2011 | 2012 | 2013  | 2014  | Total |
|-------------------------|-----------|------|------|-------|-------|-------|
| Torture complaints      | 91        | 109  | 287  | 1,165 | 2,403 | 4,055 |
| Pre-trial investigation | 4         | 19   | 40   | 199   | 1,622 | 1,884 |
| Indictments             | 4         | 2    | 1    | 4     | 0     | 11    |

*Table 1. Complaints, investigations and indictments of torture between 2006 and 2014. Source: PGR.*

The PGR has also claimed that 1,273 torture complaints were made against the military. Of those, 192 complaints were submitted between 1 December 2006 and 31 December 2012, and 1,081 between 1 January 2013 and 31 December 2014.<sup>17</sup>

On the other hand, the national human rights institution<sup>18</sup> – National Commission of Human Rights (‘CNDH’) – received 4,351 complaints of torture, and inhuman and degrading treatment between 1 January 2007 and 31 December 2011, in which the responsible institutions for the crimes were those in charge of public security, such as the SEDENA, the Ministry of the Navy (‘SEMAR’), the Federal Police (‘PF’) and the Attorney’s General Office, as is shown below:

| Institution                          | SEDENA | SEMAR | PF  | PGR |
|--------------------------------------|--------|-------|-----|-----|
| Inhuman, degrading and ill treatment | 2,801  | 322   | 210 | 920 |
| Torture                              | 77     | 8     | 2   | 11  |
| Total - Institution                  | 2,878  | 330   | 212 | 931 |
| Total - State Authorities            | 4,351  |       |     |     |

*Table 2. Complaints of torture, inhuman, degrading and ill treatment committed by public authorities between 2007 and 2011. Source: CNDH.*

Moreover between January 2007 and December 2014, CNDH issued 79 recommendations<sup>19</sup> about torture. The main institutions responsible were as follows:

<sup>17</sup> CMDPDH, ‘PGR access to information request: 0001700020115’.

<sup>18</sup> Autonomous institution, independent from Government, created by law in accordance with the Paris Principles (Principles relating to the Status of National Institutions, adopted by the UN General Assembly by UNGA resolution 48/134, 20 December 1994) (<http://www.legal-tools.org/doc/b38121/>).

<sup>19</sup> A recommendation of the CNDH is a non-binding public instrument that details human rights violations and identifies steps that State institutions should take to redress them.

<sup>20</sup> The figures indicate the number of CNDH recommendations where a specific authority was identified as bearing responsibility.

| Institution <sup>20</sup> | SEDENA | SEMAR | PF | PGR | Total |
|---------------------------|--------|-------|----|-----|-------|
| Recommendations           | 43     | 15    | 13 | 4   | 79    |

*Table 3. Responsible institutions in recommendations on torture between 2007 and 2014. Source: CNDH.*

The analysis of the recommendations issued by the CNDH provides a reasonable basis to believe that torture was inflicted upon 161 victims as a part of a security policy against organised crime. Moreover, 30 victims were identified as victims of sexual torture.<sup>21</sup>

On his visit to Mexico in 2014, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, collected information through victims’ testimonies, leading him to conclude that torture is generalised in Mexico<sup>22</sup> and that impunity prevails in most of the cases.

The documentation of cases – not only made by the Special Rapporteur, but also by the CNDH and non-governmental organisations such as Human Rights Watch<sup>23</sup> and Amnesty International<sup>24</sup> – sheds light on similar patterns of conduct by public security officers, particularly by members of the armed forces dressed as civilians, including the detention of individuals who were usually hit, insulted, threatened and driven blindfolded in unmarked cars to unknown locations, including to military facilities. When people were arrested at home, the officers entered without an arrest warrant and the property of the persons detained was damaged and stolen. The detained were tortured through, among other methods, beatings, kicks, electric shocks, asphyxiation with plastic bags, waterboarding, forced nudity, and suspension by limbs.<sup>25</sup>

<sup>21</sup> Recommendations 2006/46, 2007/15, 2008/1, 2008/26, 2008/29, 2008/31, 2008/32, 2008/33, 2008/38, 2008/55, 2008/60, 2008/67, 2009/13, 2009/16, 2009/31, 2009/33, 2009/48, 2009/52, 2009/71, 2010/11, 2010/13, 2010/19, 2010/21, 2010/22, 2010/23, 2010/42, 2010/49, 2010/50, 2010/52, 2010/57, 2010/75, 2010/77, 2010/79, 2010/86, 2011/14, 2011/31, 2011/34, 2011/41, 2011/44, 2011/49, 2011/52, 2011/63, 2011/71, 2011/75, 2011/77, 2011/86, 2011/87, 2011/2011/91, 2012/10, 2012/29, 2012/45, 2012/50, 2012/52, 2012/53, 2012/59, 2012/62, 2012/67, 2012/68, 2012/69, 2012/72, 2012/73, 2012/91, 2013/2, 2013/9, 2013/12, 2013/15, 2013/16, 2013/18, 2013/21, 2013/27, 2013/39, 2013/41, 2013/42, 2013/56, 2013/68, 2014/31 and 2014/51.

<sup>22</sup> Report of the Special Rapporteur, see *supra* note 16, para. 23.

<sup>23</sup> Human Rights Watch, ‘Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico’s “War on Drugs”’, 2011 ([http://www.hrw.org/sites/default/files/reports/mexico1111webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf)).

<sup>24</sup> Amnesty International, ‘Mexico: Out of control – Torture and other ill-treatment in Mexico’, 4 September 2014 (<https://www.amnesty.org/en/documents/AMR41/020/2014/en/>).

<sup>25</sup> Report of the Special Rapporteur, see *supra* note 16, paras. 25 and 26.

#### 4. Judicial Institutions are Mistrusted and the State is Inactive

It cannot be claimed that the thousands of reported cases and the hundreds of demonstrated cases of torture are isolated or constitute individual actions of corrupt public servants. This is especially the case when one takes into account that, before the declaration of war made by former President Calderón, torture was a practice in decline in Mexico according to the CNDH recommendations.

Given the increase in the number of victims of torture nationally, as well as its cumulative effect and repeated use as a form to obtain confessions and incriminating information, certain patterns of conduct can be inferred. The consistency of patterns confirms that torture has become an accepted mechanism for security institutions to implement a security policy aimed to combat criminal organisations, even by illegal mechanisms.

These repeated acts reveal a level of organisational coherence supported by different State institutions that discards the possibility of isolated or individual acts. In contrast, the evidence confirms that this is not about coincidental repetitions of similar torture cases, but a constant practice committed regularly.

Torture has been committed systematically in the context of the security policy aimed to combat drug trafficking. It is not about random repetitions of criminal conduct. This cannot be dismissed by institutions which operate according to such vertical structures as those of armed forces. It has been confirmed that on multiple occasions torture was committed in military facilities against victims detained for prolonged periods in different parts of the country.<sup>26</sup>

In most of the cases there are no investigations or criminal proceedings against high-ranking government officials, and those cases in which criminal investigations were pursued produced no results. There has not been a single criminal judgement against any person responsible for torture in this context, nor for any of those responsible in the 79 recommendations of the CNDH.

Furthermore, the lack of willingness and ability

<sup>26</sup> See the case of 25 police officers in Tijuana (<http://cmdpdh.org/2012/10/1a-tortura-para-fabricar-culpables-caso-25-policias-de-tijuana/>) and the case of Miriam López (<http://cmdpdh.org/casos-paradigmaticos-2-2/casos-defendidos/caso-miriam-lopez-2/>).

to bring to justice the perpetrators of crimes against humanity passively fuels attacks against civilian populations, which, at the same time, serves to prolong the combat strategy and the continuation of torture and ill-treatment.

The Mexican authorities, particularly the most senior military and civilian commanders, have access to more than enough credible information to be aware that elements of the security forces have committed torture and may well continue to do so. Pursuant to the administrative rules of the chains of command of relevant civilian and military institutions in Mexico, officers have the legal and political power to prevent and, when necessary, to punish those responsible for crimes against humanity.

#### 5. Final Remarks

In accordance with the information submitted to the ICC Office of the Prosecutor, there is a reasonable basis to conclude that crimes against humanity within the jurisdiction of the ICC have been committed in Mexico. Particularly, the ICC has reliable information about the participation of armed forces in the current security policy, in which crimes of torture have been committed systematically against civilian populations. The information submitted to the ICC Prosecutor demonstrates that high-ranking officers, both civilian and military, were aware of the crimes that were being carried out and did not do anything to prevent them or bring those responsible to justice.

All this evidence should enable the ICC Prosecutor to announce the opening of a preliminary examination into the situation in Mexico, to assess the seriousness of the allegations. This would serve the broader interests of positive complementarity, namely encouraging States to meet their primary responsibility to investigate and prosecute crimes committed by high-level officials on their territory.

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